MASALAM SDN BHD

v.

NGAH EMBONG & ANOR

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
DENIS ONG JCA
[CIVIL APPEAL NO: B-02-433 OF 1995]
20 NOVEMBER 1997

CONTRACT: *Mistake - Common mistake - Sale of property - Dispute on actual sale price - Whether sufficient evidence of common mistake*

CIVIL PROCEDURE: *Appeal - Evidence, evaluation of - Contractual dispute - Appellant pleading breach of contract - Conduct of appeal based on common mistake - Whether proper*

This was an appeal from the decision of the High Court granting the respondents/plaintiffs specific performance of a sale and purchase agreement dated 14 September 1992 in which a shophouse owned by the appellant/defendant, a developer, was to be sold at RM240,350.

The defendant claimed that prior to the signing of the sale and purchase agreement, an employee of the defendant, one Thean Lip Chong, had shown the plaintiffs a price list wherein it was stated that the price of the lot in question was RM411,386.73 and not RM240,350. The allegation of a mistake was said to have been brought to the plaintiffs' attention through a letter dated 28 October 1992 sent by the defendant's solicitor purportedly by AR registered post. The plaintiffs denied the defendant's allegations stating that they had relied on another price list stating the price of the lot to be that which appeared in the said agreement.

The main issue was whether common mistake had been sufficiently proved.

Held:
Per Mahadev Shankar JCA

[1] In view of the disputed allegations, it was imperative for the defendant to produce the best evidence to support the claim of a common mistake. However, their solicitor did not file any affidavit by Thean Lip Chong or the person who entered the sale price in the agreement to support the allegation that the letter of 28 October 1992 was in fact sent. The maker of this letter also did not give evidence in court.

[1a] There was no evidence whatsoever as to why RM240,350 was entered into the said agreement by the person who did so. It was not enough to say it was a mistake. The person who made the mistake should explain how the mistake occurred. Therefore, there was no evidence of common mistake.

[2] The claim was for specific performance but the defence was that the plaintiffs had breached the agreement by failing to make timely instalment payments resulting in the lawful termination by the defendant. There was also a counterclaim for damages for non-performance. This was totally inconsistent with the basis on which the defendant chose to contest the plaintiffs' claim or to conduct the appeal. Since the case was common mistake, the remedy was rectification.

[3] As the defendant's case was devoid of merit, the court upheld the decision of the court below and dismissed the defendant's appeal with costs without calling upon the plaintiffs' counsel to address the court.

[Decision of High Court upheld; appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan dari keputusan Mahkamah Tinggi yang memberikan responden/plaintif satu perintah pelaksanaan spesifik perjanjian jualbeli bertarikh 14 September 1992 di mana sebuah kedai yang dipunyai oleh perayu/defendan, seorang pemaju perumahan, dijual pada harga RM240,350.

Defendan mengatakan bahawa sebelum perjanjian tersebut ditandatangani, seorang kakitangan defendan, iaitu Thean Lip Chong, telah menunjukkan satu senarai harga kepada plaintif di mana dinyatakan harga untuk lot berkenaan adalah RM411,386.73 dan bukan RM240,350. Soal kesilapan dikatakan telah dibawa kepada perhatian plaintif melalui sepucuk surat bertarikh 28 Oktober 1992 yang dihantar oleh peguamcara defendan melalui pos AR berdaftar. Pengataan defendan ini disangkal oleh pihak plaintif yang mengatakan bahawa mereka telah bergantung kepada senarai harga yang lain di mana harga untuk lot berkenaan adalah sama dengan yang terkandung di dalam perjanjian tersebut.

Isu utama yang tertimbul adalah samada kesilapan bersama telah terbukti dengan berkesan.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Memandangkan pengataan yang dipertikaikan, adalah penting untuk defendan mengemukakan keterangan yang terbaik untuk menyokong tuntutan kesilapan bersama. Tetapi peguamcara defendan gagal untuk memfail apa-apa afidavit untuk Thean Lip Chong atau orang yang memasuki harga jualan di dalam perjanjian tersebut, maupun kad AR untuk menyokong pengataan bahawa surat bertarikh 28 Oktober 1992 sebenarnya dihantar. Pembuat surat tersebut juga tidak memberi keterangan di mahkamah.

[1a] Tiada sebarang keterangan kenapa harga RM240,350 telah dimasukkan di dalam perjanjian oleh orang yang berbuat demikian. Adalah tidak mencukupi untuk mengatakan ia adalah kesilapan sahaja. Orang yang bertanggungjawab untuk kesilapan tersebut terpaksa menerangkan bagaimana kesilapan itu boleh berlaku. Oleh itu, tiada keterangan satu kesilapan bersama.

[2] Tuntutannya adalah untuk pelaksanaan spesifik tetapi pembelaannya adalah bahawa plaintif telah memungkiri perjanjian dengan kegagalan untuk membuat pembayaran ansuran dalam masa yang ditetapkan mengakibatkan penamatan sah perjanjian tersebut oleh defendan. Terdapat juga satu tuntutan balas untuk gantirugi untuk kegagalan untuk mematuhi perjanjian tersebut. Ini adalah semata-matanya bertentangan dengan dasar atas mana defendan memilih untuk menentang tuntutan plaintif atau dalam mengendalikan rayuan ini. Oleh kerana kesnya adalah bergantung kepada kesilapan bersama, remedinya adalah dengan rektifikasi.

[3] Oleh kerana kes defendan tiada merit, mahkamah telah mengekalkan keputusan mahkamah bawah dan menolak rayuan defendan dengan kos tanpa memanggil peguambela plaintif untuk membuat sebarang balasan.

[Keputusan Mahkamah Tinggi dikekalkan; rayuan ditolak dengan kos]

Legislation referred to:
Rules of the High Court 1980, O. 81

For the appellant - VS Viswanathan; M/s TH Su & Co
For the respondents - Ashok K Raman; M/s Abu Talib Sharom & Zahari

[Appeal from High Court, Shah Alam; Civil Suit No: 22-87-94]

Reported by Cindy Chan

JUDGMENT

Mahadev Shankar JCA:

This is an appeal from a judgment granting the plaintiffs specific performance of an agreement relating to the sale of a shophouse.

The facts are adequately set out in the judgment of Y.A. Dato' James Foong, and do not need to be repeated here.

The only ground advanced in this appeal was that there was a genuine common mistake as to the purchase price and that severe hardship has been caused to the appellant by the grant of summary relief to the plaintiffs under O. 81 of the Rules of the High Court 1980.

The whole basis for claiming that there was a genuine common mistake was an allegation by the developer that before the sale & purchase agreement was executed on 14 September 1992 an employee of the developer by the name of Thean Lip Chong had shown the plaintiffs a price list stating that the price of the lot was RM411,386.73. See Appeal Record p. 84 para. 7. (Affidavit of Lee Teong Chye dated 22 August 1994).

The plaintiffs categorically denied this in the reply affidavit dated 7 September 1994. See Appeal Record p. 95 para. 6.

Notwithstanding the allegation the fact remains that before the sale & purchase agreement was signed the first payment by way of deposit on 4 August 1992, Appeal Record p. 133 the second payment on 27 August 1992 Appeal Record p. 134 and the third payment on 3 September 1992 all came up to 10% of RM240,350 which was the sale price in the said agreement. Appeal Record p. 113 cl. 2 and p. 126. This is a very formal agreement and there was no evidence whatsoever as to why RM240,350 was entered into the said agreement **by the person who did so**. It is not enough to say it is a mistake. The person who made the mistake should explain how the mistake occurred.

The agreement is dated 14 September 1992. The very first time an allegation of a mistake took place is in a letter by the developer's solicitor purportedly dated 28 October 1992 and purportedly sent by AR registered post. The plaintiffs denied ever receiving this letter. The copy in the Appeal Record was not the document sent to the plaintiffs but to the developer. Appeal Record p. 141. The plaintiffs' solicitors saw this document for the first time on 11 January 1993.

In the course of the affidavits filed, the developer's representative claimed that the plaintiffs were shown a price list stating the lot cost RM411,386.73. The plaintiffs denied this and said they were shown another price list upon which they relied which stated that the price was RM240,350.

The hearing took place on 20 March 1995. In view of the disputed allegations it was imperative for the developer to produce the best evidence to support the claim of a common mistake. But their solicitors did not file any affidavit by Thean Lip Chong or the person who entered the sale price in the agreement, or even the purported A.R. card to support the allegation that the purported letter of 28 October 1992 was in fact sent. Indeed it seems the developer changed its solicitors and the maker of this purported letter of 28 October 1992 also did not give evidence in the court below. In short we hold that there is no evidence of common mistake.

The claim was for specific performance. The defence was that the plaintiffs had breached the agreement by failing to make the instalments on time resulting in its lawful termination by the developer. There was a counterclaim for damages for non-performance and a declaration that the agreement had been lawfully terminated.

This is totally inconsistent with the basis on which the developer chose to contest the plaintiffs' claim or to conduct this appeal. Since their case was common mistake, their remedy was rectification. Indeed after the dispute flared up the developer's solicitors wrote on 3 November 1993 to the plaintiffs' solicitors that they would file for rectification. Appeal Record p. 159. They changed their minds on 19 November 1993. Appeal Record p. 236. The plaintiffs filed a caveat and initiated this action on 22 February 1994.

For the reasons stated, we upheld the judgment of the court below.

We dismissed this appeal with costs without calling upon the respondents' counsel to address us. With respect to the appellant's counsel we found his submissions devoid of any merit. We have also ordered that the deposit made by the appellant be paid out to the respondents to account of their taxed costs.